Items Condemned. (*Pet. App.*, pp. 40a-41a). The Corps has no property inventoried which would include the marina at the Lick Fork site and does not claim the Items Condemned. (*Pet. App.*, p. 103a; *Id.)*.

At the bench trial determining a taking occurred, Petitioner argued both Indiana and United States constitutional provisions as follows:

> Those folks, the Dukes, are using property that was placed, erected, paid for, money and sweat by the Fallon family over a period of twenty-one years. Very early on in that process of initiating proposals, it was clear that the State favored not renewing with the Fallon family, but letting someone else have it. So it was also brought to the attention of the State of Indiana that under the terms and conditions of the lease as written that the items of property that were installed by the Fallon family were theirs. That the State of Indiana which paid absolutely not one cent for any of it could not take it from the Fallon family without giving them just compensation. Of course, that's a part of the Constitution of the State of Indiana, Article 1 Section 21, as well as the United States Constitution. (*Pet. App.*, p. 57a).
>
> We'll prove they have no right to any of it and we'll prove to the Court that the Fallon family is entitled to just compensation and ask the Court to determine that that is the circumstance here under the Constitution of the State of Indiana and the United States of America and appoint three disinterested appraisers to appraise the value of the property that was taken from the Fallons and it's quite clear that personal property is the subject matter also of the

> Constitutional protections against the . . . a . . . a taking by the State without just compensation. (*Pet. App.*, p. 58a).

The trial court below relied heavily upon this Court's decision in *Van Ness v. Pacard*, 27 U.S. 137 (1829) in determining the Items Condemned by the State of Indiana were personal property of Petitioner and that a taking occurred in violation of the United States and Indiana Constitutions. In *Van Ness*, a two story house built upon a brick foundation was even deemed to be personal property and not real property and subject to removal by a lessee since it was used in trade. *Van Ness v. Pacard*, 27 U.S. 137, 146 (1829). Petitioner also has used the *Van Ness* case as the critical Constitutional analysis that the actions of the State constituted a taking at bench trial, at the jury trial on *DNR's Exceptions to the Appraisers Report* and to the Indiana Court of Appeals and Indiana Supreme Court as follows:

> For example, at bench trial, petitioner argued:
>
> > There's an old case and I've cited it in these letters. When you get a chance to read them, you'll see it. It's a United States Supreme Court case that's been adopted in Indiana with respect to trade fixtures; and it clearly says, and in that case it involved a house that was two stories high built on a brick foundation imbedded in the soil, that it was considered personal property and could have been removed was the owner of the . . . had the ownership of the lessee and the lessee could remove it before the end, which is what we ask in those letters as you'll see, the right to remove those items. And the State said no, you must not. This property is the State of Indiana's property and you may not remove it. Read the letters. You'll see it's absolutely clear. So the State took this

> property and what they claimed in the letters that were exchanged is that this is real property. It's been affixed to the real estate and it is not owned by the Fallons. We see, however, in the evidence to the Court today that if it were to be considered a part of the real estate so permanently affixed to the real estate as to become legally a part of the real estate, title would vest in the United States of America. They don't wan--. . they don't claim it." (*Pet. App.*, pp. 57a-58a).

Van Ness was also relied heavily by Petitioner in Exhibits attached and incorporated to the Complaint (*Pet. App.*, pp. 42a-45a); in Lick Fork's *Brief of Appellee* to the Court of Appeals and *Petition to Transfer* to the Indiana Supreme Court. (*Pet. App.*, pp. 31a-32a).

Further, in the trial court's *Findings of Fact Conclusions of Law and Judgment,* the extension of the Takings Clause to the United States Constitution to personal property was specifically cited by the trial court in determining a taking did in fact occur: "3. Property, in its constitutional sense, also includes personal property. 26 *Am Jur* 172 @ 595. *Warner/Elektra/Atlantic Corp. v. County of DuPage*, (CA7 ILL) 991 F 2d 1280, reh, en banc, den. (CA7 ILL) 1993 US App. LEXIS 13619."

Appraiser Charles Pund, who had extensive knowledge since he designed the construction of most of the Items Condemned testified at both bench trial and jury trial as to exactly how easily all of the Items Condemned could have been removed if Lick Fork had been permitted by DNR to remove them and even testified as to how easily the largest building, which was a wood frame structure, could have been removed. (*Pet. App.*, pp. 90a-92a [p. 99, ll. 20-25; p. 101, ll.

15-16; p. 101 ll. 17, 23-24; p. 102 ll. 2-8; 21-25; p. 103, ll. 2-9; 19-22]; 106a-107a [p. 143. ll. 10-25; p. 144, ll. 2-4]).

Another example is the gazebo which Pund testified could have just been loaded on the back of a pick-up truck or trailer. (*Pet. App.* pp. 104-105a [p. 136; ll. 8-16]). Pund testified Lechner excavation would remove the marina building, the landscaping area; which includes martin bird houses and flag poles; the concrete parking lot which was going to be torn up and hauled to Bernard Fallon, President of Lick Fork Marina, Inc's property approximately one-half mile away also on Patoka Lake; the handicap ramp and stairs; the utilities and accessories leading to docks were going to also be dug up and removed to Fallons other property. Pund also testified as to how Lechner Excavation would remove the utility lines and the rip-rap (*Pet. App.* pp. 105-106a [p. 137, ll. 2-23]; p. 107a [p. 143; ll. 13-25; p. 144; ll. 3-4]).

Court appointed appraiser Douglas Hulsman, who installed the electrical services testified at both the bench trial and jury trial that the electrical services could be removed by Lick Fork before the end of its lease had the DNR permitted removal and specifically told the judge and jury how he would do so since all were put in with cords and a conduit specifically so that Fallon could move them if needed and had in fact moved sections "practically every Spring." (*Pet. App.*, pp. 93-94a; [p. 109 ll. 13-25; p. 110 ll. 11-23;] pp. 108a-109a, [p. 210, ll. 4-11]).

Bernard Fallon testified at the bench trial and the jury trial how the removal of the Items Condemned could have been easily accomplished and that he was ready, willing and able to move all of the Items Condemned to his other property one-half mile away on Patoka Lake and did intend to do so until DNR mandated he leave all Items Condemned.

(*Pet. App.*, pp. 84a-90a [p. 54, l. 25; p. 57, ll. 15-19; p. 58, ll. 7-17; p. 59, ll. 5-13; p.61, ll. 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-10; 12-13; p. 88 ll. 5-6; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96; ll. 14-17]). For example, the rip-rap installed by Fallon was merely going to be removed with a scooper. Fallon was also going to remove the deck itself with a flatbed trailer and take it to his other property without even taking it apart. (*Pet. App.* p. 88a [p. 61 ll. 11-13; p. 64; ll. 12-13; p. 66; l. 25; p. 67; l. 2-4]). The electrical lines would be taken back through the conduit and just rolled up. A landscape company would remove the bushes and trees paid for and placed by the Fallons. (*Pet. App.* p. 89a [p. 87 ll. 8-13; p. 88; ll. 5-6; p. 91, ll. 24-25; p. 92 ll. 3-5; p. 93; ll. 22-24]).

After bench trial, the trial court below entered a final appealable judgment on October 8, 2001, finding a taking of the Items Condemned did occur. (*Pet. App.*, pp. 60a-61a; pp. 19a-30a). The *Findings of Fact, Conclusions of Law and Judgment* stated in part:

"JUDGMENT

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court, that the plaintiff have judgment determining an inverse condemnation of the items condemned by the State of Indiana has taken place.

As such, this matter shall proceed as if it were administered under I.C. 32-11-1, except as an inverse condemnation.

The defendant, under I.C. 32-11-1-5, may appeal from the decision in the manner that appeals are taken from final judgments in civil actions.

SO ORDERED this 8th day of October, 2001."

(Pet. App., p. 30a).

On November 30, 2001, DNR filed a "Motion to Reconsider" (*Pet. App.*, p. 61a), which was denied on January 9, 2002. (*Pet. App.*, p. 61a). The decision was not appealed. (*Pet. App.*, pp. 59a-69a).

On May 6, 2002, DNR filed its *Suggestions of Appraisers*, suggesting Steven R. Woerner who was later appointed and testified at jury trial. (*Pet. App.*, pp. 70a-71a; p. 104a). On June 10, 2002, Douglas J. Hulsman, Charles L. Pund and Steven R. Woerner appeared and accepted appointment. The Court entered a written *Oath of Appraisers* and *Written Order on Appointment of Appraisers*. (*Pet. App.*, p. 64a; pp. 72a-74a).

In their *Report of Appraisers*, all three Court appointed appraisers indicated that the cost of removing the Items Condemned was $30,200.00 compared to their fair market value of $407,400.00. (*Pet. App.*, pp. 75a-77a). The cost of restoring the land to its original condition after removal was only $2,400.00. (*Pet. App.*, p. 76a). Consistently, expert appraiser David Miller testified the cost of removal was $19,760.00 and cost of restoration of the land after removal was $2,000.00. (*Pet. App.*, p. 108a [p. 173, ll. 16-19]). The *Oath of Appraisers* and written *Order on Appointment of Appraisers* was never appealed. (*Pet. App.*, pp. 59a-69a).

The only Article in the lease agreement between DNR and Lick Fork discussing eminent domain reads:

> *Section 12.01. Taking by Eminent Domain. If, during the Demised Term, the Leased Real Estate or any substantial portion thereof shall be taken as a result or the exercise of the power of eminent domain, this lease shall terminate and each party shall look to the taking authority for compensation for any and all*

> *damage, loss or injury suffered as a result of such taking. . .* (*Pet. App.*, p. 40a).

According to the testimony of Pund, Hulsman and Steven R. Woerner, at jury trial just compensation was $374,800.00. (*Pet. App.*, pp. 75a-77a; p. 104a [p. 93, ll. 4-8]; p. 106a [p. 140, ll. 4-8]; p. 109a [p. 210, ll. 12-14]). According to Miller, just compensation was $461,240.00. (*Pet. App.*, p. 108a, [p. 173, ll. 20-22]). According to Fallon, just compensation was $669,000.00. (*Pet. App.*, p. 109a [p. 268, ll. 24-25; p. 269, l. 2]).

The jury entered a verdict against the State of Indiana, Indiana Department of Natural Resources in the amount of $432,600.00. (*Pet. App.*, pp. 16a-18a). The jury verdict was less than the amount of damages testified to by Miller. (*Pet. App.*, pp. 16a-18a; p. 108a [p. 173, ll. 20-22]). On September 8, 2003, the trial court entered judgment after jury verdict in the amount of $515,469.57, which included $432,600.00 plus statutory interest at a rate of eight percent (8%) per annum since DNR took possession on March 31, 2001. (*Pet. App.*, pp. 14a-15a; pp. 79a-80a [p. 27, ll. 2-5]).

On November 26, 2003, DNR filed a *Notice of Appeal.* (*Pet. App.*, p. 69a). On January 6, 2005, the Court of Appeals of Indiana reversed the trial court's determination after bench trial held October 8, 2001 that a taking occurred and jury verdict, holding that a taking did not occur. (*Pet. App.*, pp. 3a-13a). The Indiana Supreme Court denied transfer on April 28, 2005 without Opinion. (2005 Ind. LEXIS 405) (*Pet. App.* pp. 1a-2a).

REASONS FOR GRANTING THE PETITION

The Takings Clause of the Fifth Amendment to the United States Constitution applicable to the States through the due process clause of the Fourteenth Amendment "prohibits the government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), *citing Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

This Court has consistently held that the prohibition against taking private property for public use without just compensation applies to inverse condemnation cases such as this one: "We have recognized that [HN3] a landowner is entitled to bring such an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .' *United States v. Clarke*, 445 U.S. 253, 257 (1980), *quoting* 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)." *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

In that case, this Court reversed a California Court of Appeals opinion in an inverse condemnation case which held that a landowner who alleged that his property had been taken by a land-use regulation could not recover damages for the time before it was ultimately determined that the land-use regulation arose to a "taking" of his property and mandated that "the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

In inverse condemnation cases, or taking by seizure, the

burden shifts to the landowner "to discover the encroachment and to take affirmative action to recover just compensation." *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 712 (1999) quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980). It is clear that Petitioner Lick Fork certainly met this duty to take affirmative action:

In December, 1999, *prior to the expiration of the Lease Agreement between DNR and Lick Fork as extended*, the DNR made an offering to the public to make proposals on what was Lick Fork Marina which included all of the Items Condemned. (*Pet. App.*, pp. 79a-80a [p. 27, ll. 2-5]). On October 9, 2000 Lick Fork gave written notice to DNR that the Items Condemned were the property of Lick Fork. (*Pet. App.*, pp. 42a-45a). Also at a meeting held January 11, 2001, Lick Fork made clear to DNR that the Items Condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. (*Pet. App.*, pp. 80a-82a [p. 36, ll. 20-22; p. 38, ll. 6-23]). A letter of January 18, 2001, also memorialized that ownership. (*Pet. App*, pp. 46a-48a).

Nevertheless, on February 6, 2001, DNR gave written notice to Lick Fork to vacate the premises no later than March 31, 2001, and on February 23, 2001, Chief of Staff and General Counsel for the DNR by letter mandated to Petitioner Lick Fork that all of the Items Condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed." (*Pet. App.*, pp. 50a-51a). On March 1, 2001 Lick Fork through counsel wrote Doehrmann, as representative of the DNR, that the Items Condemned were the personal property of Lick Fork and that the action of the DNR constitutes a condemnation of those items. (*Pet. App.*, pp. 52a-55a). Ultimately, effective March 31, 2001, DNR leased the real estate together with all of the Items Condemned which were paid for and erected by the

Fallon family over a period of more than twenty years to Hoosier Hills Marina, Inc. (*Pet. App.*, pp. 79a-80a, [p. 27, ll. 2-5]).

The only Article in the lease agreement between DNR and Lick Fork discussing eminent domain reads:

> *Section 12.01. Taking by Eminent Domain. If, during the Demised Term, the Leased Real Estate or any substantial portion thereof shall be taken as a result or the exercise of the power of eminent domain, this lease shall terminate and each party shall look to the taking authority for compensation for any and all damage, loss or injury suffered as a result of such taking. . .* (*Pet. App.*, p. 40a).

Consistently, Lick Fork filed its *Complaint in Inverse Condemnation*, on April 19, 2001. (*Pet. App.*, pp. 33a-37a).

In inverse condemnation cases, the property owner is placed at an even greater disadvantage than when the state initiates condemnation proceedings even when the state does not dispute the taking:

> [T]he mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner at "a significant disadvantage." *Id.* at 258; cf. id at 255 "There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding"; 84 Stat. 1906, § 304, 42 U.S.C. § 4654 (recognizing, at least implicitly, the added burden by providing for recovery of attorney's fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary

condemnation cases).

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 712 (1999) quoting *United States v. Clarke,* 445 U.S. 253, 258 (1980). Here, since the State not only disputed the taking but filed an Exception to the Report of Appraisers thus requiring a jury trial on the Appraisers Exceptions, "the disadvantage to the owner becomes all the greater." *Id.*

It is clear just as the trial court found that the Federal Constitutional prohibition against a governmental entity taking property without just compensation extends to not just real property but personal property. 26 *Am Jur* 172@595. *Warner/Elektra/Atlantic Corp. v. County of DuPage,* (CA7 ILL) 991 F 2d 1280, reh, en banc, den (CA7 ILL) 1993 US App. LEXIS 13619; *United States v. Cors,* 337 U.S. 325 (1949); *Ruckelshaus v. Monsanto Co,* 467 U.S. 986 (1984).

In *Warner/Elektra/Atlantic Corp. v. County of DuPage,* the United States Court of Appeals for the Seventh Circuit noted:

> [HN4]Nothing in the notion of "property," whether as used in the due process clause of the Fourteenth Amendment, which has been held (by incorporation of the just-compensation clause of Fifth Amendment) to require just compensation when state government takes private property for a public use, or in the constitutional and statutory provisions of Illinois governing condemnation, limits condemnation and inverse condemnation to real property. It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation.

Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F. 2d 1280, 1285 (7th Cir. 1993); citing *United States v. Cors,*

337 U.S. 325 (1949); *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 1001-1004 (1984); *Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 362, 399 N.E.2d 1295, 1299, 35 Ill. Dec. 767 (1980); *Illinois Cities Water Co. v. City of Mt. Vernon*, 11 Ill. 2d 547, 550-51, 144 N.E.2d 729, 731 (1957) (dictum).

Many cases decided by this Court illustrate this Court's fierce protection of our citizens against a governmental entity taking his or her property, whether real or personal, without just compensation. For example, even intangible interests have been held to be a property right protected by the Fifth Amendment's prohibition against taking without just compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984). In establishing a trade secret as a property right pursuant to the Fifth Amendment's prohibition against taking without just compensation, this Court illustrated with other instances in which intangible interests were held as such:

> Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. See, e.g. *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien provided for under Maine law protected by Takings Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (valid contracts are property within meaning of the Takings Clause). *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

Even permanent flooding by the government of a citizen's land was found to be a compensable taking under the Fifth Amendment to the United States Constitution. *United States v. Lynah*, 188 U.S. 445, 462, 468 n2 (1903). In that case, this Court clearly distinguished condemnation proceedings and the property owner's action to recover damages for the taking such as Petitioner's herein. *United State v. Clarke*, 445 U.S. 253, 255 (1980) citing *United States v. Lynah*, 188 U.S. 445, 462, 468 n2 (1903).

Here, all of the Items Condemned were clearly personal property of Lick Fork and were taken without any compensation, let alone just compensation by the State of Indiana as this Court and the United States Constitution have mandated must be paid. This Court has made clear that trade fixtures are personal property and subject to removal *at any time* prior to the expiration of a leasehold by a tenant. In *VanNess v. Pacard,* 27 U.S. 137 (1829), this Court held:

> Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes. . . .*VanNess v. Pacard,* 27 U.S. 137, 144 (1829).
>
> But [HN3] the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton vs. Lawton*, 3

> Atk. R. 13, Lord Hardwicke said, (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. . .The only point is, whether it is accessary to carrying on the trade or not. If bona fide intended for this purpose, it falls within the exception in favour of trade. . . . .
>
> But if the residence of the family were, merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well, without the presence of many persons by night as well as by day. *Van Ness v. Pacard*, 27 U.S. 137, 147 (1829).

In that case, the building was used as a residence and to carry on the carpenter and dairy trade. The house was two stories high and built upon a brick foundation imbedded in the soil; nevertheless, it was held that it was personal property and subject to removal by the tenant at any time before the expiration of the leasehold. This Court held that the intention of the tenant was to erect buildings and equip them with machinery for the purpose of carrying on his business. *Id.* at 141.

Here, it is uncontroverted that all of the Items Condemned were used in the marina trade at all times. Even the largest structure, the marina building was merely a wood frame structure and according to Court appointed Appraiser Charles Pund: "it's light, I mean, I think it would be fairly simple, you know, for a person to be able to move something like that. . . . and we've got anchor bolts in there, six foot on center, half inch anchor bolts which . . . uh . . once you find

the pattern, I mean, basically just open the walls up on the inside, remove some drywall. You can loosen the bolts up. The building can be raised up, I mean, you could bring a crane in there and pick it up and swing it up onto the parking lot on the . . uh . . movable dollies and thus move it to the location." (*Pet. App.*, pp. 90-92a [p. 99; ll. 20-25; p. 102; ll. 23-25; p. 103, ll. 2-5]).

Compelling evidence was introduced at the bench trial determining a taking occurred and the jury trial on damages by all three court appointed appraisers, expert appraiser Miller and Fallon that the Items Condemned could have been removed by Lick Fork, that Fallon intended to do so, the real estate restored to a good condition, all at a reasonable price especially compared to the value of the Items Condemned, and in advance of the end date of the Lease. (*Pet. App.*, pp. 84a-94a [p. 54, l. 25, p. 57, ll. 15-19, p. 58, ll. 7-17; p. 59, ll. 5-13; p. 60, ll. 20-23; p. 61, ll. 2-4 and 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-13; p. 88, ll. 5-6; p. 91, ll. 24-25; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96, ll. 14-17; p. 99, ll. 20-25; p. 101, ll. 15-17 and 23-24; p. 102, ll. 2-8 and 21-25; p. 103, ll. 2-9 and 19-22; p. 109, ll. 10-25; p. 110, ll. 11-23]; p. 104a-109a [p. 136, ll. 8-16; p. 137, ll. 2-23; p. 143, ll. 10-25; p. 144, ll. 2-4; p. 173, ll. 16-19; p. 210, ll. 4-11]).

Lick Fork paid for the Items Condemned not DNR. (*Pet. App.*, p. 80a [p. 29, ll. 22-25; p. 30, l. 2]; p. 88a-89a [p. 83, ll. 3-7]). Lick Fork filed tax returns and paid personal property taxes on the Items Condemned. (*Pet. App.*, p. 35a; pp. 42a-45a; p. 78a-79a [p. 14, ll. 19-25; p. 15, ll. 2-4; p. 22, ll. 7-11]). All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the personal property of Lick Fork, and not DNR. (*Pet. App.*, pp. 82a-83a [p, 39, ll. 9-22]; pp. 95a-102a).

No evidence exists that Lick Fork or the Fallon family ever gave up any claim for the Items Condemned.[1] Here, the Lease provided for an initial ten-year term as well as an extension thereof for two additional terms of five years each. (*Pet. App.*, p. 38a). It is not logical nor reasonable to conclude that Fallon would have put the Items Condemned upon leased premises with a leasehold of only twenty years, and especially in the readily movable condition as testified by Appraisers Hulsman and Pund and Fallon himself if Fallon had not considered that the Items Condemned were his and that he could have removed or otherwise disposed of them before the leasehold expired especially since the Items Condemned were to be moved to Fallon's property only one-half mile away. Further, after a three day trial, a verdict was entered against the DNR in the amount of $432,600.00 on August 22, 2003. Much time and money was spent in the appraisal and court process.[2]

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[1]Lick Fork continued to pay taxes for and registered the underground tanks and accessories with the State as being owned by Lick Fork. (*Pet. App.*, pp. 95a-102a). The State further admitted the underground storage tank belonged to Lick Fork by listing "Lick Fork Marina, Inc." as the owner. (*Pet. App.*, pp. 95a-102a).

[2]The judgment finding the actions of DNR constituted a taking entered on October 8, 2001, by the trial court was a final and appealable judgment pursuant to *State v. Robertson et al*, 293 N.E.2d 775 (Ind. 1973), a case decided by the Indiana Supreme Court after *Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc.*, 247 Ind. 161, 162-63, 213 N.E.2d 705, 706 (1966), the case cited in the Court of Appeals Opinion. (*Pet. App.* p. 10a). That judgment was not appealed within thirty days. Instead, DNR filed a "Motion to Reconsider" on November 30, 2001; 22 days late. (*Pet. App.*, p. 61a). DNR's "Motion to Reconsider" was denied January 9, 2002. The trial court's denial of the same was not appealed. (*Appellant's Appendix*, pp. 1-7). The appraisers were appointed on June 10, 2002. (*Pet. App.*, pp. 72a-74a). (Cont'd)

No evidence was presented by DNR that removal of the Items Condemned would cause injury to the property. In fact, the overwhelming evidence showed the contrary. DNR itself suggested appraiser Woerner, who was appointed. (*Pet. App.*, pp. 70a-71a). The position of the DNR with respect to the Items Condemned was clearly and unequivocally stated. On February 6, 2001, Davis, Deputy Director of DNR, gave notice to Lick Fork to vacate the premises no later than March 31, 2001. (*Pet. App.*, p. 49a). Davis stated: "All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana." (*Pet. App.*, p. 49a). In direct contravention to this prior mandate, on February 23, 2001, seventeen days later, DNR, through Carrie Doehrmann, Chief of Staff and General Counsel for DNR wrote Lick Fork through Tucker by letter which was attached thereto and incorporated into Petitioner's *Complaint in Inverse Condemnation*:

> "[*P*]*lease be advised that it is our opinion that the marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to the various docks, in-ground fuel storage with all attachments, utility lines and rip-rap are not personal property and as such are property of the State of Indiana and are not to be removed.*" (*Pet. App.*, pp. 50a-51a).

(Cont'd)
DNR did not appeal the Order Appointing Appraisers as *Thiesing Veneer Co. of Ind. v. State* (1970), 254 Ind. 699, 262 N.E.2d 382, another Indiana Supreme case decided after *Towne Motel* mandates. The jury trial was not held until August 20, 21, and 22, 2003. (*Pet. App.*, pp. 66a-68a).

In holding that a taking did not occur, the Indiana Court of Appeals used the definition of a fixture from *Black's Law Dictionary* and did not discuss this Court's holdings in cases involving trade fixtures: "A fixture is 'personal property that is attached to land or a building and that is regarded as an irremovable part of the real property.' Black's Law Dictionary, 652 (7th ed. 1999)." (*Pet. App.*, p. 11a). Even using arguendo the definition by the Court of Appeals, the clear evidence supports the trial court's determination that a taking by DNR occurred since none of the Items Condemned were attached to the land and *not one of the Items Condemned, not even the largest structure, the wooden marina building* was remotely regarded as irremovable according not only to Fallon but Court appointed appraisers Charles Pund and Douglas Hulsman. (*Pet. App.*, pp. 90a-94a [p. 99, ll. 20-25; p. 101, ll. 15-17 and 23-24; p. 102 ll. 2-8 and 21-25; p. 103, ll. 2-9 and 19-22; p. 109, ll. 10-25; p. 110, ll. 11-23]; 104a-107a [p. 136, ll. 8-16; p. 137, ll. 2-23; p. 143. ll. 10-25; p. 144, ll. 2-4]).

Another example which is completely inapposite to the Court of Appeals Opinion's definition of a fixture is the gazebo which Pund testified could have just been loaded on the back of a pick-up truck or trailer. (*Pet. App.* pp. 104-105a [p. 136; ll. 8-16]). Further, Pund testified Lechner Excavation would remove the marina building, the landscaping area; which includes *martin bird houses and flag poles*; the concrete parking lot which was going to be torn up and hauled to Fallon's property located a half-mile away also on Patoka Lake; the handicap ramp and stairs; the utilities and accessories leading to docks were going to also be dug up and removed to Fallons other property. Pund also testified as to how Lechner Excavation would remove the utility lines and the rip-rap (*Pet. App.* pp. 105-107a [p. 137, ll. 2-23; p. 143; ll. 13-25; p. 144; ll. 2-4]).

Court appointed appraiser Douglas Hulsman, who installed the electrical services specifically testified at both the bench trial determining a taking occurred and jury trial that all electrical lines were movable since all were put in with cords and a conduit specifically so that Bernie could move them if needed and had in fact moved sections "practically every spring." (*Pet. App.*, pp. 93-94a; [p. 109 ll. 13-25; p. 110 ll. 11-23;] pp. 108a-109a, [p. 210, ll. 4-11]). Thus, the electrical services certainly were not regarded as irremovable since they were built to be moved and were moved frequently during the course of the leasehold.

Consistently, Bernard Fallon testified at the bench trial and the jury trial the rip-rap installed by Fallon was merely going to be removed with a scooper. Fallon was also going to remove the deck itself with a flatbed trailer and take it to his other property without even taking it apart. (*Pet. App.* p. 88a [p. 61 ll. 11-13; p. 64; ll. 12-13; p. 66; l. 25; p. 67; l. 2-4]). The electrical lines would be taken back through the conduit and just rolled up. A landscape company would remove the bushes and trees paid for and placed by the Fallons. (*Pet. App.* p. 89a [p. 87 ll. 8-13; p. 88; ll. 5-6; p. 91, ll. 24-25; p. 92 ll. 3-5; p. 93; ll. 22-24;] *Pet. App.*, pp. 84a-90a [p. 54, l. 25; p. 57, ll. 15-19; p. 58, ll. 7-17; p. 59, ll. 5-13; p.61, ll. 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-10; 12-13; p. 88 ll. 5-6; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96; ll. 14-17]).

No where in the Indiana Court of Appeals Opinion-For Publication is the *Van Ness v. Pacard*, 27 U.S. 137 (1829) case or United States Constitutional provisions prohibiting a Taking without just compensation discussed. (*Pet. App.* pp. 3a-13a). The Indiana Supreme Court, without Opinion, denied Transfer of the decision of the Indiana Court of Appeals, thus affirming the Opinion if the Court of Appeals of Indiana

in its entirety. (*Pet. App.*, pp. 1a-2a).

Certainly the witnesses testimony at the bench trial determining a taking occurred and jury trial on damages establish the removal of Petitioner's personal property consisting of a wooden marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping (which included bird houses and flag poles), established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap was much easier than a building built upon a brick foundation imbedded in the soil in the *Van Ness* case. (*Pet. App.* p. 83a-89a [p. 50, ll. 21-25; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9; p. 57, ll. 11-15; p. 58, ll. 7-17; p. 60, ll. 20-23; p. 61, ll. 2-4; p. 83, ll. 3-7]).

The trial Court certainly quoted *Van Ness v. Pacard*, 27 U.S. 137 (1829) in the *Findings of Fact, Conclusions of Law and Judgment* determining a taking occurred as well as the *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F. 2d 1280 (7th Cir. 1993)* case and its United States Constitutional analysis determining personal property is subject to the protection of the Takings Clause to the United States Constitution. (*Pet. App.*, pp. 27a-29a - *Conclusions of Law* 3-6).

The lease agreement itself provides further evidence which supports the trial court's determination a taking by the State of Indiana, DNR occurred herein:

> Section 14.03 Title to Property.
> Title to any and all buildings, structures and other improvements erected or placed on the Leased Real

> Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee. (*Pet. App.*, p. 40a).

The lease clearly only vests title "to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, *which are so permanently fixed to the real estate as to become legally a part of the real estate*" in the United States of America. (*Id.*). "All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee." (*Id.*)

The Corps of Engineers has not transferred and does not claim any rights to the Items Condemned. (*Pet. App.*, p. 40a; p. 41a; p. 103a). Thus, the plain reading of the Lease agreement between Lick Fork and DNR makes it clear: "All other property placed or erected on the leased real estate by the Lessee shall belong to Lessee." (*Pet. App.*, p. 40a, Section 14.03). Any property that is not vested *in the United States of America* has become the property of Lick Fork as the trial court correctly concluded.

The Items Condemned were all used in the marina trade, all were removable and all were clearly intended to be removed by Petitioner. (*Pet. App.*, pp. 83a-90a [p. 50, ll. 21-24; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 54, l. 25; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9 and 11-19; p. 58, ll. 7-17; p. 59-60, ll. 5-13; p. 60, ll. 20-23; p. 61, ll. 2-4 and 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 83, ll. 3-7; p. 87, ll. 9-13; p. 88, l. 5-6; p. 91, ll. 24-25; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p 96, ll. 14-17]; pp. 9-10 above). Thus,

it is clear that the State of Indiana, Department of Natural resources took Lick Fork Marina, Inc.'s personal property, the Items Condemned without any compensation at all, let alone just compensation in direct contradiction to the Fifth Amendment to the United States Constitution: " . . . nor shall private property be taken for public use, without just compensation." When such a taking has occurred, the owner's damages will be based upon the property's fair market value just as the jury decided in this case. *Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001).* See, e.g., *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 54 S. Ct. 704 (1934); 4 J. Sackman, Nichols on Eminent Domain § 12.01 (rev. 3d ed. 2000).

CONCLUSION

Petitioner respectfully requests that its *Petition For Writ of Certiorari To The Indiana Court of Appeals* be granted and further prays the judgment of the Indiana Court of Appeals be reversed and that the trial court's judgment and jury verdict below be reinstated.

Respectfully Submitted,

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